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IN THE

Supreme Court of the United States

JAMES W. NEWTON, JR.,
DBA JANEW MUSIC, PETITIONER

v.

MICHAEL DIAMOND; ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF MEET THE COMPOSER, AMERICAN COMPOSERS FORUM, ELECTRONIC MUSIC FOUNDATION, SAN FRANCISCO CONTEMPORARY MUSIC PLAYERS, DR. BILLY TAYLOR, OSVALDO GOLIJOV, JON JANG, GRANT GERSHON, STANELEY CROUCH, GARY GIDDINS, MARTY EHRLICH, FARAH JASMINE GRIFFIN, BILL FRISSELL, LEE TOWNSEND AND ROBERT G. O'MEALLY IN SUPPORT OF PETITIONER

ERIC J. FARBER
FARBER & COMPANY
ATTORNEYS, LLP
847 Sansome Street, LL
San Francisco, CA 94111
(415) 434-5320
Attorney for Amici Curiae

CURRY & TAYLOR • WASH D.C. • (202) 223-3160 • USSCINFO.COM

MOTION OF AMICI CURIAE FOR LEAVE TO FILE BRIEF

Prospective amicus parties Meet the Composer ("MTC"), American Composers Forum ("ACF"), Electronic Music Foundation ("EMF"), San Francisco Contemporary Music Players ("SFCMP"), Dr. Billy Taylor, Osvaldo Golijov, Jon Jang, Grant Gershon, Stanley Crouch, Gary Giddins, Marty Ehrlich, Farah Jasmine Griffin, Bill Frisell, Lee Townsend and Robert G. O'Meally hereby respectfully request leave to file a brief as amici curiae in support of James Newton's petition for writ of certiorari. Amici have sought the consent of each of the respondent parties, but none of the respondents have granted consent. Petitioner has consented to the filing of the amicus brief.

Amici are a collection of nationally renowned music organizations, composers, producers, commentators, and professors who are at the forefront of the jazz and avant-garde music community. The depth and breadth of knowledge and experience of the amicus parties enables them to present this Court with a perspective unequalled by any of the individual parties to this suit. First and foremost, amici share an interest in protecting original artistic creation, especially in music, and are able to provide the Court with a detailed explanation of the kinds of music implicated by this suit. This, in turn, provides the foundation upon which the Court can evaluate petitioner's central argument that certain kinds of music are so complex, non-traditional, or sophisticated that they should not be evaluated without specialized expertise. Amici also are uniquely positioned to inform the Court of the great public importance of the issues

presented in this case to composers, musicians, producers, and all others involved in the music industry.

For the above reasons Amici respectfully request that the Court grant leave to file the accompanying amicus brief in support of Petitioner James Newton.

Respectfully submitted,

Eric J. Farber
Farber & Company Attorneys, LLP
847 Sansome Street, LL
San Francisco, CA 94111
(415) 434-5320
Attorney for Amici Curiae

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INTEREST AND IDENTITIES OF AMICUS PARTIES

Meet The Composer ("MTC") is a non-profit organization based in New York City whose mission is to increase opportunities for composers by fostering the creation, performance, dissemination, and appreciation of their music. MTC was founded in 1974 as an outgrowth of a program of the New York State Council on the Arts. MTC seeks to enable composers to make a living writing music and to increase their visible presence as creative artists. Through a range of commissioning, residency, education and audience interaction programs, MTC has revolutionized the environment for composers in this country, establishing broadly accepted standards of payment and opening doors for them to work in a variety of cultural institutions.

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[1] No persons or entities other than amici curiae, their members, and their counsel, have made monetary contributions to the preparation or submission of this brief. Counsel for Petitioner James Newton have provided editorial suggestions concerning the substance of the brief.

American Composers Forum ("ACF") was founded in 1973 as the Minnesota Composers Forum. The American Composers Forum is committed to supporting composers and developing new markets for their music. Its 1,700 members include composers and performers, presenters and organizations that share ACF's goals, and individuals and institutions with an interest in supporting new music. Through granting, commissioning, and performance programs, ACF provides composers at all stages of their careers with valuable resources for professional and artistic development.

Electronic Music Foundation ("EMF") is a non-profit organization based in New York City whose mission is to empower individual creativity and expand the public's range of musical experience. Founded in 1994, EMF fosters exploration and the development of new ideas by producing events, disseminating information and materials about the history and current practice of electronic music, and maintaining a global network of contacts and collaborators.

The **San Francisco Contemporary Music Players** ("SFCMP") is a leader among American performing ensembles dedicated to contemporary chamber music. A nine-time winner of the national ASCAP/Chamber Music America Award for Adventurous Programming of Contemporary Music, this ensemble of 19 musicians has performed more than 1,000 contemporary works, made or contributed performances to sixteen recordings, and has widened the audience of this repertoires through publication and outreach over the last 34 years.

Dr. Billy Taylor is considered one of the leading jazz educators today. After receiving a bachelor degree in music in 1942, Dr. Taylor moved to New York where he worked with Ben Webster and played with such important musicians as Dizzy Gillespie, Don Redman and Charlie Parker. Years later he became the house pianist at Birdland where he supported such artists as Roy Eldridge, Lee Konitz and Oscar Pettiford. In 1975, he received his DME (Doctorate of Music Education) from the University of Massachusetts for his dissertation *The History and Development of Jazz Piano: a New Perspective for Educators*, and in 1982 he published a further work entitled *Jazz Piano: History and Development.* Along with his commitment to education, he has continued to develop as a pianist, displaying a light, fluid and inventive bop style.

Osvaldo Golijov is a composer whose work is performed regularly by musicians such as Robert Spano, Miguel Harth-Bedoya, Dawn Upshaw, Luciana Souza, Maya Beiser, the St. Lawrence, Kronos and Borromeo quartets, and orchestras such as the Boston Symphony and Los Angeles Philharmonic. Dr. Golijov has collaborated on more than 30 works with the Kronos Quartet, and has received numerous commissions from major ensembles and institutes in the U.S. and Europe, including a MacArthur Fellowship, among many other awards. After studying with Mark Kopytman in the Ukraine, whose influence on him included aleatoric music and graphic notation, Golijov arrived in the United States in 1986 and studied with George Crumb while earning a Ph.D from the University of Pennsylvania.

Jon Jang is a nationally recognized San Francisco Bay Area composer, pianist and artistic director of jazz and new music ensembles, whose original works are acclaimed for their compelling mix of different influences and sounds. As a composer, Mr. Jang has received commissions from the NEA, Rockefeller Foundation, Cal Performances, Berkeley Repertory Theatre, Festival 2000 and the Kronos Quartet.

Grant Gershon, who was appointed music director of the Los Angeles Master Chorale in July 2001, has garnered tremendous critical acclaim during his two seasons at the helm of the renowned chorus. Prior to joining the Chorale, Gershon served as assistant conductor of the Los Angeles Philharmonic from 1994-97. He has guest conducted the St. Paul Chamber Orchestra, Houston Grand Opera, Julliard Opera Theatre, and the Finnish chamber orchestra Avanti!, among others, and conducted performances at the Edinburgh, Vienna, Helsinki, Ravinia, and Aspen Music Festivals, the Roma-Europa Festival, and the Festival Otonno in Madrid. In addition to recording with the Los Angeles Master Chorale, Gershon has made a number of other recordings and served as chorus master on two Grammy-nominated CDs, *Sweeney Todd* and Ligeti's *Grand Macabre.*

Stanley Crouch is a columnist, novelist, essayist, critic and television commentator. He has served since 1987 as an artistic consultant at the Lincoln Center in New York City, and is a co-founder of the department known as the Jazz at Lincoln Center. In 1993, he received the Jean Stein Award from the American Academy of Arts and Letters and a MacArthur Foundation Grant.

Gary Giddins was author of the Weather Bird column for the Village Voice for 30 years. His writings on jazz have appeared in many other publications, including the New York Times, the New Yorker, Esquire, the Atlantic, the Los Angeles Times, the Boston Globe, and Jazz Times, to which he presently contributes a monthly column. His book "Visions of Jazz" is the only work on jazz ever to win a major mainstream literary prize, the 1998 National Book Critics Circle Award in criticism. His other books include biographies of Bing Crosby, Louis Armstrong Charlie Parker, and volumes of music criticism: "Riding on a Blue Note," "Rhythm-a-ning," and "Weather Bird." His music writing has earned him an unparalleled six ASCAP Deems Taylor Awards, a Guggenheim Fellowship, a Peabody Broadcasting Award, a Grammy Award, and a lifetime achievement award from the Jazz Journalists Association.

Marty Ehrlich is a composer, ensemble leader, and multi-instrumentalist. In 2004 he received a Guggenheim Fellowship in Music Composition. He is currently Visiting Professor of Music at Hampshire College. He has received numerous grants from the New York Foundation for the Arts, the NEA, the Mary Flagler Charitable Trust, and the Doris Duke Foundation. In 2002 he was named Jazz Clarinetist of the year by the Jazz Journalist Association. In 2000 he was the Peter Ivers Visiting Artist at Harvard University. Marty Ehrlich graduated from the New England Conservatory of Music, of which he is a Distinguished Alumni. He has recorded 15 CD's of his own compositions. The Boston Phoenix called his 2003 recording "The Long View" "one of a handful of

integral long-form works in jazz, standing beside those of the likes of Hemphill, Mingus, and Ellington."

Farah Jasmine Griffin is Director of the Institute for Research in African American Studies and Professor of English and Comparative Literature at Columbia University in New York. She is the author of *Who Set You Flowin': The African American Migration Narrative* (Oxford, 1995) and *If You Can't Be Free, Be a Mystery: In Search of Billie Holiday* (Free Press, 2001). She has edited a number of collections including, *Uptown Conversation: The New Jazz Studies*, a collection of essays co-edited with Robert O'Meally and Brent Hayes Edwards (Columbia University Press, 2004). Professor Griffin's essays and articles on jazz have appeared in The New York Times, Harper's Bazaar, The Philadelphia Inquirer, and Miles Davis and American Culture, and she has written liner notes on Billie Holiday, Lena Horn and Dinah Washington. Her latest book on Miles Davis and John Coltrane (authored with Salim Washington) will be published by Simon and Schuster in 2006. Dr. Griffin has taught at Trinity College, the University of Pennsylvania, and Jazz at Lincoln Center, and has lectured widely on African American literature, music, and politics. Dr. Griffin received her bachelor's degree from Harvard University and her Ph.D in American Studies from Yale University.

Bill Frisell, a guitarist, composer and bandleader, has established himself as a visionary presence in American music in a career spanning more than 20 years and 150 recordings, including 20 albums of his own. Over the years, Frisell has contributed to the work of such collaborators as Paul Motian, John Zorn, Elvis Costello,

Ginger Baker, The Los Angeles Philharmonic, Suzanne Vega, Loudon Wainwright III, Van Dyke Parkes, Rickie Lee Jones, Wayne Horvitz, Hall Wilner, Robin Holcomb, Vernon Reid, Julius Hemphill and the Frankfurt Ballet. His wide-ranging catalog has been cited by Downbeat as "the best recorded output of the decade." Mr. Frisell's most recent album, *Unspeakable*, received the 2005 Grammy Award for Contemporary Jazz record.

Lee Townsend is an independent music producer, artist manager and owner of Songline/Tone Field Productions, specializing in recordings of singer-songwriters, contemporary composers, improvising musicians and cross-cultural musical collaborations. Since 1983,- Townsend has produced recordings of numerous artists including Bill Frisell, John Scofield, Rinde Eckert, Vinicius Cantuaria, Shweta Jhaveri, Dino Saluzzi, Loudon Wainwright III, Elvis Costello, Pat Metheny, Joey Baron, Charlie Hunter, T.J. Kirk, Dave Holland, Hank Jones and John Abercrombie. Lee Townsend is also the producer of the "Century of Song" program for the Ruhr Triennale Arts festival in Germany. He has been Vice President of Artists and Repertoire for Verve/Polygram Records, General Manager and Director of U.S. Operations at ECM Records and a staff producer at National Public Radio affiliate, KCRW-FM in Santa Monica. He has also collaborated on motion picture soundtracks and theater music.

Robert G. O'Meally is Zora Neale Hurston Professor of Literature at Columbia University, where he has served on the faculty for fifteen years. Since 1999, he has been the Director of Columbia's Center for Jazz

Studies. He is the author of *The Craft of Ralph Ellison* and *Lady Day: The Many Faces of Billie Holiday*, and was the principal writer of *Seeing Jazz*, the catalogue for the Smithsonian's exhibit on jazz painting and literature. Dr. O'Meally has co-edited three volumes, *History and Memory in African American Culture*, *The Norton Anthology of African American Literature*, and *Uptown Conversation: The New Jazz Studies*, which was released last year. He has edited *The Jazz Cadence of American Culture*, which was awarded the ASCAP–Deems Taylor prize in December 1999, and a collection of essays for Modern Library entitled *Living With Music: Ralph Ellison's Essays on Jazz*. He also wrote the script for the documentary film *Lady Day* and for the documentary accompanying the Smithsonian exhibit, *Duke Ellington: Beyond Category*. Dr. O'Meally was nominated for a Grammy for his work as co-producer of the 1998 five-CD box set *The Jazz Singers*. He received his B.A. from Stanford (1970) and his Ph.D. from Harvard (1975).

REASONS FOR GRANTING THE PETITION

In their Brief of Amicus Curiae, Amicus parties herein respectfully ask the Court to grant Petitioner James Newton's petition for writ of certiorari and address the issues set forth below.

I. THE ISSUE OF HOW TO MEASURE THE APPROPRIATION OF A MUSICAL SAMPLE IS A MATTER OF GREAT PUBLIC IMPORTANCE

Since the introduction of digital reproduction technology, a legal debate has surrounded the musical practice of digital sampling. The most critical issue in that debate is the question of how to analyze complex or sophisticated musical work. In his petition for writ of certiorari, Petitioner James Newton asks this Court to address a split in the circuits regarding how to measure the substantiality of copied musical expression. Amici agree with petitioner James Newton that this matter is of wide public importance to musicians, artists, producers and consumers, and should be addressed by the Supreme Court.

"The term *digital sampling* or *sampling,* refers to the recording of a sound, or a portion of a previously existing sound recording, with the aid of a device that can store the recording in binary form in the memory of a computer. Sampling was made possible by the emergence of digital sound and computer technology in the 1960s and 1970s and has been made practical in the 1980's and 1990's by the widespread availability of inexpensive sampling-capable digital synthesizers and personal computers." A. Kohn & B. Kohn, Kohn on Music Licensing, 2nd Ed., 1287-1288 (1996). Since the introduction of digital sampling equipment in the 1980s, audio collage techniques have come to play a major role in the musical mainstream. *See, e.g.,* Robert M. Szymanski, *Audio Pastiche: Digital Sampling, Intermediate Copying, Fair Use,* 3 UCLA Ent.L.Rev. 271 (1996) (describing history of digital music

sampling). Low cost audio editing software such as Pro-Tools have enabled a new generation of amateur and professional musicians to craft new compositions out of pre-existing musical works on their home computer.[2] The musical practice of digital sampling has also spawned numerous articles, books, and law review articles.[3]

This explosion of sampling technology and lack of uniform legal precedent brings to mind the pending high profile case of MGM v. Grokster, Case No. 04-480, with one exception. Whereas the controversy surrounding file-sharing of musical works has existed for only a few years, the debate surrounding digital sampling in the music industry has continued unabated for over two decades. As Amicus parties in support of

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[2] Recent examples include "The Grey Album" by D.J. Dangermouse, an unauthorized CD release combining instrumentation of the Beatles' "While Album" with acapella vocal tracks originally intended for rapper Jay Z's "Black Album." R. Walker, "Consumed: The Grey Album," NY Times, March 21, 2004 at Section 6 , Page 32 , Column 1. *See also* J. Leeds, "Timeline: Mix and Mash," NY Times, Jan. 9, 2005 at Section 2 , Page 4 , Column 5 ("Roughly 30 years after D.J.'s began mixing songs into clever new forms, the mash-up -- in which two or more songs are fused into one -- has ascended from underground phenomenon to commercial fad[.]")

[3] *See e.g.*, Nancy L. McCullough, Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 Harv. L. Rev. 726 (1992); Nancy L. McCullough, *Making the Case Against Illicit Sampling*, 26 Beverly Hills Bar Ass'n J. 139 (1992); David Sanjek, *"Don't Have to DJ No More": Sampling and the "Autonomous" Creator*, 10 Cardozo Arts&Ent.L.J. 607 (1992); Michael L. Baroni, *A Pirate's Pallette: The Dilemma of Digital Sound Sampling and a Proposed Compulsory License Solution*, 11 U. Miami Ent. & Sports L.Rev. 91 (1993).

Respondents Michael Diamond, *et al.* advised the Ninth Circuit two years ago:

> [W]e believe that it is crucial for this Court to appreciate the significance of the precedent set by this case to innovation and creativity in the musical arts. A rule remains to be written applying fundamental principles of copyright in light of the ascendancy of digital sampling in the artistic and creative process of producing and recording music, and the continued technological developments in that process.

Amicus Curiae Brief in Support of Appellees (Filed Nov. 25, 2002) at 5. On this point, Amici on both sides are in full agreement. More than ever, the federal courts, musicians, the music industry, and consumers of digital editing software seek clarity regarding how to measure the substantiality of a segment of a copyrighted work, particularly where that work is complex, non-traditional, or derives from another culture. The need for clarity is especially pressing given the unjust legal results that can occur, as in Newton v. Diamond, where an "ordinary lay person" standard is used to analyze a complex, non-traditional or avant-garde musical work. For this reason, Amici believe a uniform standard should be applied when analyzing whether a particular musical work has been infringed, regardless of whether it is through digital sampling or more traditional means.

II. AMICI BELIEVE THE COURT SHOULD ADOPT AN APPROACH TO ANALYZING SUBSTANTIALITY OF MUSICAL EXPRESSION THAT RESPECTS THE WIDE DIVERSITY OF MUSICAL PRACTICE

Amici agree with Petitioner James Newton that analysis of difficult and challenging musical works should not be left to an ordinary lay audience, but rather must be evaluated by an audience that has been provided with sufficient expertise to understand the language of the work in question. Music, like language, is contextual and is best understood by those who are conditioned to its cultural practices and traditions. If a listener does not understand the rules, he or she cannot understand a composer's intent or the richness of the resulting musical expression. As Justice Holmes observed in Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903), with respect to works of visual art:

> It would be a dangerous undertaking for persons trained only in law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their authors spoke.

This is the challenge faced by composers of new music, whose work currently would be evaluated in the

Fourth Circuit by a person who "possesses specialized expertise . . . that lay people would lack," and in the Ninth Circuit by the contrary standard of an "ordinary lay observer" lacking expertise. *See, e.g.*, Dawson v. Hinshaw Music, Inc., 905 F.2d 731, 736 (4th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990) (adopting specialized audience approach); Swirsky v. Carey, 376 F.3d 841, 847 (9th Cir. 2004) (reaffirming "ordinary, reasonable person" approach).

Amici believe the approach taken by the District of Columbia, First, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits is inconsistent with the legal system's gradual awakening to the complexity of musical language. For instance, timbre, tone, spatial organization, consonance, dissonance, accents, note choice, combinations, interplay of instruments, basslines, and new technological sounds can all be elements of a musical composition. See Debra Presti Brent, *The Successful Musical Copyright Infringement Suit: The Impossible Dream*, 7 U. Miami Ent. & Sports. L. Rev. 229, 248-249 (1990); Stephanie J. Jones, *Music Copyright in Theory and Practice: An Improved Approach for Determining Substantial Similarity*, 31 Duq. L. Rev. 277, 294-95 (1993); see also Tempo Music, Inc. v. Famous Music Corp., 838 F.Supp. 162, 168 (S.D.N.Y. 1993) ("In contemporary music, and particularly in the jazz music genre, musicians frequently move beyond traditional rules to create a range of dissonant and innovative sounds."). One commentator believes it is the very complexity of music expression that has caused courts to be inconsistent in analyzing the substantial similarity of musical works, noting:

> [T]here is something in music which makes it difficult for lay observers to agree as to whether the mere possibility of substantial similarity exists. The impact of that "something" upon consistency of determinations regarding substantial similarity ... appears to be considerable.
>
> At least one source of that complicating "something" may be found in the very complexity of music.

Alice J. Kim, *Expert Testimony and Substantial Similarity: Facing the Music in (Music) Copyright Infringement Cases*, 19 Colum.-VLA J.L. & Arts 109 (1995), published in R.H. Chused, A Copyright Anthology: The Technology Frontier, 253, 262-63 (1998). Given these inconsistencies, Amici are concerned that the Ninth Circuit's reliance on an "ordinary, reasonable person" standard in Newton v. Diamond fails to address the complexity inherent in 20th and 21st Century forms of musical expression.

Amici are particularly concerned regarding use of an "ordinary reasonable person" when evaluating works in contemporary genres like minimalism. "Minimalist music, at least originally, tended to restrict itself to a tiny repertoire of pitches and rhythmic values, like the F Dorian scale and steady 8th-notes of Philip Glass's "Music in Fifths." The length of the works actually underlines the intense restriction of materials: you might write a four-minute piece using only seven pitches and no one would notice, but write a 30-minute piece, and the austere limitations become a

major phenomenon of the composition." K. Gann, *Thankless Attempts at a Definition of Minimalism*, in C. Coss & D. Warner (Eds.) Audio Culture: Readings in Modern Music at 299 (2004). Minimalist works frequently adopt many of the musical techniques found in James Newton's composition *Choir*, including static harmony, repetition, additive process, phrase shifting, permutational process, steady beat, static instrumentation, linear transformation (including shifts from tonality to atonality), compositional use of overtones, influence of non-western cultures and audible structure. *See* K. Gann, *supra*, at 300-302. An "ordinary reasonable person" whose understanding of music is limited to only melody, harmony and rhythm would lack the necessary skills to evaluate the substantiality of appropriation in such a nuanced work.

Works of microtonality may also require analysis by one informed by specialized expertise in that genre. "As an element in the assimilation of ethnic influences from other regions of the world, microtonal tunings supply intervallic configurations that sound fresh to Western ears and lend themselves to a wide variety of new expressive possibilities. . . . New tunings have opened up innovative approaches to harmony and melody, while the exploitation of unused acoustical processes associated with just intonation, especially those involving interference patterns (or 'beatings'), has introduced a spectrum of timbral effects largely untapped in previous Western music." R.P. Morgan, Twentieth-Century Music at 440 (1991). Examples here include the 43-tone scale of Harry Partch, a composer who used original instruments (including the "spoils of war," "diamond marimba" and "harmonic cannon") to create "music so utterly out of step, not

only with the musical mainstream but also with the avant-garde of the time, it's difficult to appreciate fully in today's more experimental climate." Id. at 303-304.

Traditional and contemporary works of jazz are particularly ill-served when analysis is rendered by those unfamiliar with its language. The difficulty of capturing the essential elements of a jazz composition on paper is widely understood, as the notation system itself remains at odds with the aesthetic values of the music and the creative spirit of its practitioners. M. Tucker, The New Grove Dictionary of Jazz, 1213 (B. Kernfeld, ed., 2000). Although composers and performers of jazz continue to use Western staff notation, this music is not always adequately expressed using traditional notational methods. R. Witmer, The New Grove Dictionary of Jazz, 921 (B. Kerfeld, ed., 2000). Standard notation may be adapted to represent melody in jazz, but it has only limited ability to convey deviations from standard pitch, including compositional elements such as vibrato, blue notes, bends, microtonal and intonational nuances. Id. at 923. *See also* T. Ellingson, "Notation," in H. Myers, (ed.) Ethnomusicology: An Introduction, 153-154 (1992) (observing that African-American musical forms, particularly jazz and spirituals, place far less emphasis on written notation).

An ordinary reasonable person may also be unfamiliar with more recent innovations in electronic music, which is often studio-based and seldom notated.[4]

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[4] "Purely electronic compositions rarely exist in score form, since none is needed for 'performance,' only to supply purely technical information about how the composition was made." R.P. Morgan, Twentieth-Century Music (1991) at 471.

An electronic work by Stockhausen, a work of *musique concrete* by Pierre Schaeffer, and an early 'industrial' piece by the late 1970s group Throbbing Gristle may sound foreign to the lay audience, while a trier of fact with specialized expertise may more readily grasp qualitative and quantitative elements in this music beyond a traditional measure of melody, harmony and rhythm. As 20th Century composer Edgar Varese has remarked:

> Although the new music is being gradually accepted, there are people who, while admitting that it is 'interesting,' say 'but is it music?' It is a question I am only too familiar with. Until quite recently I used to hear it so often in regard to my own works that, as far back as the twenties, I decided to call my music 'organized sound' and myself, not a musician, but 'a worker in rhythms, frequencies and intensities.'

E. Varese, "The Electronic Medium" (lecture) 1962, in Audio Culture: Readings in Modern Music (2004) at 20.

As with electronic music, ordinary lay audiences may also be generally unfamiliar with contemporary musical genres beyond the commercial mainstream, such as Brian Eno's "Ambient Music,"[5] or the intricate musical language of dub reggae and its many

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[5] *See* B. Eno, "Ambient Music," in Audio Culture: Readings in Modern Music (2004) at 95 ("So a recording composer may spend a great deal of her compositional energy effectively inventing new sounds or combinations of sounds.").

descendents, including electronica and hip-hop, where "the mixing board becomes a pictorial instrument, establishing the illusion of a vast soundstage and then dropping instruments in and out as if they were characters in a drama." D. Toop, "Replicant: On Dub," in Audio Culture, *supra* at 357. Rather, a consistent legal analysis of such music demands an analysis by one reasonably familiar with the music's language, including here the "odd perspectives and depth illusions, sound effects, unexpected noises and echoes that repeat into infinity." Id.

Compositional techniques may also involve directing the musician to use unconventional ways of playing conventional instruments, which may not be understood by an ordinary reasonable person. "Often this necessitate[s] a purposeful "misplaying" of the instrument to elicit sounds it was not originally intended to make. . . . Other innovations include woodwind 'multiphonics' (several pitches sounding simultaneously, produced with 'false' fingerings and overblowing);[6] breathing through brass instruments without producing a pitch; key clicks on woodwinds; humming and playing simultaneously on winds, blowing through a mouthpiece not attached to an instrument; playing a piano with a metal rod placed on the strings; playing on the strings of a double bass with percussion mallets (requiring two players, one to finger, one to strike); dipping a sounding tam tam into a bucket of water (thus 'bending' its pitch); and playing timpani

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[6] The Ninth Circuit in Newton v. Diamond recognized that the composition *Choir* made compositional use of multiphonics on flute. *See* Newton v. Diamond, 388 F.3d 1189, 1191 (9th Cir. 2003).

with crotales placed on the drum head." R.P. Morgan, Twentieth Century Music (1991) at 391.

Many different types of folk and ethnic music also play an increasing role in modern composition. This interest in musical cross-fertilization is one manifestation of the increasingly 'global' nature of modern music, from John Cage's interest in Eastern philosophy to Toru Takemitsu's integration of native Japanese elements with Western music. Id. at 421-422. This is equally true when considering the overwhelming influence of African music on jazz, blues and spiritual compositions. Contemporary popular music increasingly reflects the influence of what Marshall McLuhan has described as the "global village." Amici urge the Supreme Court to recognize the increasing popular and commercial impact of world music, and affirm that lower courts must analyze foreign musical works from the perspective of one with an understanding of that music culture.

For each of these reasons, Amici believe that the Federal Circuit split regarding the perspective of the ordinary or specialized audience when evaluating the substantiality of original expression in a copyrighted work should be resolved by the Supreme Court. In resolving this issue, Amici respectfully ask the Court to take an approach that will respect, as much as possible, the widest diversity of musical expression, regardless of musical genre or its culture of origin.

CONCLUSION

For the foregoing reasons, Amici respectfully request that the petition for writ of certiorari by James Newton be granted.

Respectfully submitted,

Eric J. Farber
Farber & Company Attorneys, LLP
847 Sansome Street, LL
San Francisco, CA 94111
(415) 434-5320
Attorney for Amici Curiae